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November 6, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Petition of the State Independent Alliance and the Independent
Telecommunications Group for a Declaratory Ruling that the Basic
Universal Service Offering Provided by Western Wireless in Kansas is
Subject to Regulation as Local Exchange Service, WT Docket No. 00-239

Dear Ms. Salas:

The State Independent Alliance and the Independent Telecommunications Group (together, "Petitioners"), by counsel, hereby update the record in the above-referenced proceeding and inform the Commission that the Kansas Corporation Commission ("KCC") has issued an order designating Western Wireless as an eligible telecommunications carrier ("ETC") for the rural areas of Kansas. A copy of the order is attached.


In making its ruling, the KCC specifically did not decide whether the service offering for which Western Wireless sought both federal and state universal service support is a fixed or mobile service. Instead, the KCC expressly deferred to the Commission with respect to that issue (Order at ¶ 15), which is consistent with its comments in this proceeding asking that the Commission rule whether Western Wireless' service is fixed or mobile. Petitioners are seeking reconsideration of the KCC's order with respect to certain rulings regarding Kansas law, including the conclusion that Kansas law does not require an ETC to provide equal access as petitioners are required to do in order to be eligible for Kansas state universal service support.

Because the issue of whether federal law preempts a state requirement that ETC's, among other things, provide equal access on a competitively neutral basis remains open in Kansas, petitioners urge the Commission to soon issue a declaratory ruling to clarify whether Western Wireless' service is fixed or mobile.

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Pursuant to 47 C.F.R. § 1.1206(b)(1) an original and one copy of this letter, including the attachment, are being filed.

Sincerely,



John B. Adams, Esq.

Attachment

**CC: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Thomas Sugrue
James Schlichting
Jeffrey Steinberg
Rose Crellin
Qualex**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: John Wine, Chair
Cynthia L. Claus
Brian J. Moline

In the Matter of GCC License Corporation's Petition)
for Designation as an Eligible Telecommunications) Docket No. 99-GCCZ-156-ETC
Carrier.)

**ORDER ON PETITION OF WESTERN WIRELESS
FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER**

COMES NOW, the above-captioned matter for consideration and determination by the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows.

Procedural History and Limited Finding of Fact

1. On September 2, 1998, GCC License Corporation d/b/a Western Wireless (Western or WW) filed its application for designation as an eligible telecommunications carrier (ETC) in Kansas for the purpose of receiving federal and state universal service support. The application was assigned Docket No. 99-GCCZ-156-ETC.

2. On September 4, 1998, Sprint Spectrum L.P. d/b/a Sprint PCS (Sprint) filed its ETC application for the purpose of receiving federal and state universal service support. The application was assigned Docket No. 99-SSLC-173-ETC.

3. In its *Order #2*, the Commission consolidated the two separate ETC dockets in the interest of efficiency because each application involved very similar issues. *Order #2 To Consolidate Dockets, Grant Petitions to Intervene, and Establish Issues and Procedural Schedule*, issued

December 10, 1998. The Commission's *Order #2* also identified an initial list of issues and requested comments from the parties on them, as well as identification of additional issues.

4. Petitions to intervene by AT&T Communications of the Southwest (AT&T) and Southwestern Bell Telephone Company (SWBT) were granted by the Commission on October 29, 1998. The Citizens' Utility Ratepayer Board (CURB), the State Independent Alliance (SIA) and the Independent Telecommunications Group, Columbus et al. (Columbus) were granted intervenor status on December 10, 1998.

5. In its *Order #6*, dated January 18, 2000, the Commission designated Western and Sprint as additional ETCs in non-rural telephone company wire centers for federal universal service support purposes. *Order #6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Centers for Federal Universal Service Support Purposes*, issued January 18, 2000. And, in its *Order #7*, dated February 29, 2000, the Commission designated Western and Sprint as ETCs for state universal service support purposes in non-rural company service territories.

6. In its *Order No. 10*, the Commission found that, for State purposes and as a general principle, "allowing additional ETCs to be designated in rural telephone company service areas is in the public interest." *Id.*, at ¶ 7. However, the Commission noted that the finding was a presumption that could be rebutted by individual rural telephone companies; but, the burden of proof was on the rural telephone companies to demonstrate by specific study area that it was not in the public interest to designate additional ETCs in those rural areas. *Id.*, at ¶ 8. The Commission also designated Sprint PCS as an ETC in the Sprint/United study area.

7. Pursuant to Commission *Order No. 10*, Western filed its basic universal service (BUS) offering on July 25, 2000, including the price and terms of the offering along with a copy of the

customer service agreement. In response, SIA and Columbus filed their Statement in Opposition to Western's BUS Offering in Kansas (*Opposition Statement*).¹

8. In its *Order No. 11*, the Commission found that it was in the public interest to designate Western as an additional ETC in the Sprint/United Study area for federal universal service support purposes.

9. Shortly before the scheduled hearing to determine if it was in the public interest to designate Western as an additional ETC in specified RLEC service areas, Western, the RLECs and Commission Staff submitted a joint stipulation which requested cancellation of the hearing and admission into the record of all prefiled testimony, comments, statements and information, including without limitation Western's Compliance Regarding the Details of Its BUS, Statement in Opposition of the affected RLECs, Western's Response to the RLECs' Opposition to BUS and the submissions by the RUS Administrator and the Docking Institute. Although Sprint and CURB did not join in the stipulation, they were not opposed to its adoption by the Commission. The sponsors of the stipulation recommended that they file their respective proposed findings of fact and conclusions of law. The Commission approved the stipulation on April 30, 2001.

10. On April 25, 2001, Sprint filed its Petition to Withdraw (Petition) from these proceedings based on its belief that the remaining issues to be determined by the Commission pertained to the distribution of funds from the Kansas Universal Service Fund (KUSF) for the support of rural areas. Sprint announced that, at present, it did not intend to request KUSF draws for that purpose. Petition, ¶ 4. The Commission granted Sprint's request in its Order dated May 3,

¹SIA and Columbus jointly filed the Opposition Statement; they will hereinafter be referred to as the RLECs (rural local exchange companies), unless the context requires otherwise.

2001, and closed Docket No. 99-SSLC-173-GIT. The Commission finds that Sprint's limited Petition has no effect upon the Commission's finding that it was in the public interest to designate Sprint as an additional ETC in the Sprint/United study area for federal universal service purposes. See, *Order No. 10*, ¶ 11.

Findings of Fact and Conclusions of Law

11. The Commission finds that the issue to be determined herein is whether the RLECs have presented sufficient evidence to rebut the presumption that it is in the public interest to designate Western as an additional ETC in the specific rural telephone company service areas identified in this Docket.² The Commission will, however, make determinations on a number of matters related to this issue that were raised by the RLECs notwithstanding the fact that the matters pled were not service area-specific as required by the Commission in its *Order No. 10*. The Commission stresses that, in using its discretion to make these determinations, it does not find those RLEC pleadings that are deficient to be in compliance with *Order No. 10*.

12. In *Order #5*, the Commission recognized that the federal Telecommunications Act of 1996 (Federal Act) established the criteria by which it could designate more than one common carrier as an additional ETC for federal universal service support purposes:

²Those service areas are: (1) Blue Valley Telephone Company, Inc., (2) Council Grove Telephone Company, (3) H&B Communications, Inc., (4) Home Telephone Company, Inc., (5) Lallarpe Telephone Company, Inc., (6) Madison Telephone Company, Inc., (7) MoKan Dial, Inc. (8) Moundridge Telephone Company, (9) Mutual Telephone Company, (10) Peoples Mutual Telephone Company, (11) Tri-County Telephone Association, Inc., (12) Twin Valley Telephone, Inc., (13) Wamego Telephone Company, Inc., (14) Wilson Telephone Company, Inc. and (15) Zenda Telephone Company, Inc. (*Order #5*, issued March 19, 1999; *Affidavit of Gene DeJordy in Support of GCC License Corporation Petition as an Eligible Telecommunications Carrier*, filed April 9, 1999; *Order*, dated October 27, 2000; *WWC License L.L.C.'s Response to the Rural LECs' Opposition to WWC's Basic Universal Service Offering*, filed January 26, 2001).

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) [. . .an ETC. . . .shall, throughout the service area for which the designation is received, offer the services that are supported by Federal universal service support mechanisms under section 254(c). . . .and advertise the availability of such services and the charges therefor] as an eligible telecommunications carrier for a service area designated by the State Commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission, may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State Commission shall find that the designation is in the public interest.

47 U.S.C. § 214(e)(2) (1996). *Order #5*, ¶15. The services that are supported by federal universal service support, and which must be provided by the carrier requesting ETC status, are (1) voice-grade access to the public switched telephone network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to long distance services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. *Id.*, ¶¶ 14 - 17.

13. The Kansas Legislature defined universal service in a similar fashion--K.S.A. 2000 Supp. 66-1,187(p)--with the exception that it added "equal access" in front of "to long distance services". At first blush, this would cause some concern with Western's application because Western admittedly does not provide 1+ dialing to the toll carrier of the customer's choice and could do so only by substantially changing the "way in which Western Wireless engineers its network and runs its business." (*Western Response to SIA-007 DR*). The RLECs cite the Fifth Circuit Court of Appeals decision in *Texas Office of Public Utility Council v. FCC*, 183 F.3d 393 (1999) as standing

for the proposition that a state may impose its own eligibility requirements for ETC designation. *Opposition Statement*, p. 6. Because the Kansas Legislature has defined universal service as including equal access to long distance services, the RLECs reason that designating Western as an additional ETC in rural service areas for KUSF support would violate state law. *Id.* However, federal legislation provides that:

...[a] person engaged in the provision of commercial mobile services, as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services.

47 U.S.C. § 332(c)(8). Thus, if Western's BUS service offering qualifies as a commercial mobile radio service (CMRS), Western is not required to provide equal access under federal law.

14. The RLECs and Western are sharply divided whether Western's service is CMRS or something else. The RLECs maintain that Western's service is "fixed" and should be regulated. (*Declaratory Petition*¹, p. 4). Western, on the other hand, insists that BUS uses the same antennae, cell sites, towers, trunk lines, mobile switching centers and interconnection facilities that are employed in the provision of "conventional cellular services". (*Supplemental Testimony of James Blundell (Blundell)*, p. 3). Western explains that the only difference between its conventional cellular service and BUS is a wireless access unit used to interface with Western's network instead of a hand-held cellular phone. *Id.* Western contends that the FCC will confirm that BUS is CMRS. *Id.*, p. 6.

¹The RLECs filed a petition with the FCC seeking a ruling that Western's service was fixed and not commercial mobile radio service (CMRS). *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling That the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, Petition for Declaratory Ruling, filed November 3, 2000 (*Declaratory Petition*).

15. It is of interest to note that the FCC granted Western its Petition for ETC Designation in the State of Wyoming, finding that Western was a CMRS provider. (*Memorandum Opinion and Order*, CC Docket 96-45, released December 26, 2000 [*Wyoming Order*]). There has been no evidence presented in this Docket that Western's mode of providing telecommunications services is any different in Kansas than it is in Wyoming. However, because the RLECs' Declaratory Petition is now before the FCC, the Commission declines to determine whether or not Western's BUS is CMRS; rather, the Commission finds it prudent to defer to the FCC's judgment.

16. Even if the Commission were to find here that Western's BUS was not CMRS, the Commission concludes that it would not be in violation of state law, as the RLECs contend, to designate Western as an additional ETC in specified rural telephone service areas. K.S.A. Supp. 66-2004(c) establishes the requirements that a telecommunications carrier must meet in order to earn an ETC designation from the Commission:

Pursuant to subsection (f) of section 253 of the federal act, any telecommunications carrier that seeks to provide telephone exchange service or local exchange access in a service area served by a rural telephone company shall meet the requirements of subsection (c)(1) of section 214 of the federal act for designation as an eligible telecommunications carrier for that area before being permitted by the commission to provide such service; however, the guidelines shall be consistent with the provisions of subsection (f) (1) and (2) of section 253 of the federal act.

§ 253(f) of the Federal Act simply permits a State to require a telecommunications carrier to first obtain an ETC designation before providing local service in an RLEC serving area. On the other hand, § 214(e)(1) of the Federal Act proves to be much more significant to the issue herein. Specifically, a telecommunications carrier may be designated as an additional ETC in rural telephone company service areas if it, throughout the service area:

(1) offers the services that **are supported by Federal universal service support mechanisms**, and (2) advertises the availability of these services and the charges therefor in media of general distribution.

47 U.S.C. § 214(c)(1) (1996) (emphasis added). The Commission, therefore, concludes that K.S.A. 2000 Supp. 66-2004 (c) authorizes the Commission to designate a telecommunications carrier as an additional ETC for specific rural telephone company service areas for KUSF purposes if it offers, at a minimum, those services which qualify the ETC for federal universal service support. Only access to toll providers, not equal access, is required by the Federal Act. (*Responsive Testimony of Staff Witness Janet Buchanan (Buchanan)*, filed January 26, 2001, p. 6).

17. The RLECs frequently point to K.S.A. Supp. 66-1,187(p) as support for their position that the Kansas Legislature requires a carrier to provide equal access if it wishes to receive support from the Kansas Universal Service Fund. (*See, e.g., Opposition Statement*, p. 6). As noted above, this statutory provision defines universal service as including equal access to long distance services. However, 66-1,187(p) is only a definitional provision and does not address support draws from the KUSF. The statutory provision that does address KUSF support is K.S.A. Supp. 66-2008, and of particular interest here 66-2008(c):

Pursuant to the federal act, distribution from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers, that are deemed eligible both under subsection (e)(1) of section 214 of the federal act and by the commission.

This statutory provision does not limit distribution from the KUSF only to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers that furnish equal access to toll providers. What 66-2008(c) does say is that those

telecommunications carriers which are deemed eligible under § 214(c)(1) of the Federal Act and deemed eligible by the Commission may receive KUSF distributions.

18. Furthermore, the RLECs' reliance on K.S.A. 66-1,187(p) ignores an important statutory provision—K.S.A. 2000 Supp. 66-2002(a) which directs the Commission to “adopt a definition of ‘universal service’ and ‘enhanced universal service,’ pursuant to subsections (p) and (q) of section 2”. The Commission complied with the Legislature’s instructions in its Order in Docket No. 94-GIMT-478-GIT⁴, dated April 4, 1996 (*Competition Order*). In that Order the Commission defined universal service as including “access to toll (national and international) network” and “**equal access with 10XXX dialing**”. (*Competition Order*, pp. 16 - 17, emphasis added). A Western customer can use a dial-around toll service provider. (*Buchanan*, p. 7). Therefore, the Commission concludes that Western provides equal access in accordance with the Commission’s definition of universal service by providing access to toll providers and enabling users to access dial-around toll service providers.

19. As noted above, the Commission found in its *Order No. 10* that “as a general principle, [] allowing additional ETCs to be designated in rural telephone company service areas is in the public interest.” *Id.*, p. 3. The Commission also found that this “general public interest finding is a presumption which may be rebutted by individual rural telephone companies.” *Id.*, p. 4. The Commission directed Western to file its universal service offering and afforded the RLECs the opportunity to file their opposition to Western’s filing. *Id.* However, the Commission cautioned the RLECs that the response of any rural telephone company providing service in an exchange in which

⁴*In the Matter of a General Investigation into Competition within the Telecommunications Industry in the State of Kansas*, Docket No. 190,492-U, 94-GIMT-478-GIT, (*Competition Docket*).

Western has filed for ETC designation must be:

. . . a specific and detailed statement of why it is not in the public interest to designate Western Wireless in its area. This filing is not for the purpose of re-arguing whether economic or regulatory theories and principles, in general, support a public interest determination. The filing is to focus on the particular factual circumstances existing in a service area and on the effect on customers in the area.

Id.

20. In response to Western's BUS filing, the RLECs submitted their *Opposition Statement*. Although it appears that significant effort was expended by the RLECs in producing their *Opposition Statement*, it fails to provide the "particular factual circumstances existing in a service area and on the effect on customers in the area" if Western is designated as an additional ETC in that particular service area. The RLECs' discussion of (1) Western's provision of universal service, (2) certification requirements, (3) substandard services, (4) expanded local calling scope and (5) rural entry guidelines all are either "economic or regulatory theories and principles" arguments or fail to provide particular factual circumstances existing in a service area and the effect on customers in the area if Western is designated as an additional ETC in that particular service area.

21. The RLECs first argue that Western's BUS offerings are substandard services which should not be supported by the KUSF. They insist that Western must preserve and enhance universal service in order to qualify for universal service support. Although the RLECs place the cart before the horse, they are, in a sense, correct. The Kansas Telecommunications Act of 1996 (KTA) authorizes the Commission to grant ETC status to a telecommunications carrier if the application complies with guidelines issued by the Commission. K.S.A. 2000 Supp. § 66-2004(d). Those guidelines are meant to:

... ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of customers. The preservation and advancement of universal service shall be a primary concern.

K.S.A. 2000 Supp. § 66-2004(b). If the Commission finds that the applicant complies with the guidelines, it may designate the carrier as an additional ETC and then the successful applicant qualifies for KUSF support.

22. The requirement that an ETC “preserve and enhance universal service” lends itself to many interpretations due to the general nature of the terms “preserve” and “enhance”. The Commission finds that the FCC’s determination in this regard best establishes when universal service is being preserved and enhanced:

... an eligible carrier is “preserving and advancing universal service” by providing each of the core services designated for support to low-income consumers in rural, insular, or high cost areas, and by offering those services in accordance with the specific eligibility contained in section 214(e).

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, released May 8, 1997, ¶ 138 (footnotes omitted). The RLECs maintain, consistent to a point with the FCC’s finding, that:

... determination of whether WW’s BUS preserves and enhances universal service in the State of Kansas must focus on the list of services contained in part 54.101 of the FCC’s rules, and any other service WW claims to offer.

Opposition Statement, p. 10. As noted above, the 54.101 services are (1) voice-grade access to the public switched telephone network, (2) local usage, (3) dual tone multi-frequency signaling or its functional equivalent, (4) single-party service or its functional equivalent, (5) access to emergency

services; (6) access to operator services, (7) access to interexchange services, (8) access to directory assistance and (9) toll limitation for qualifying low-income consumers.

23. Western maintains that it currently offers and can provide those core services and will advertise their availability using media of general distribution. (Affidavit of Western's Gene DeJordy (*DeJordy*) pp. 2 - 6). The RLECs appear to concede that Western is able to provide the 54.101 services (*Opposition Statement*, pp. 11 - 12) and do not dispute Western's intentions to advertise those services. Furthermore, the RLECs readily agree that their service areas are "sparsely populated rural areas that are costly to serve" and are "even more rural, on average, than the national average for rural LECs. . . ." (*Barron Testimony*, Ex. C of *Opposition Statement*, (*Barron*) pp. 8 - 9). Western provides its services throughout the service areas of the RLECs identified *supra*, footnote 2. With the exception of the joint service areas of Bluestem and Moundridge, the RLECs do not dispute that Western is able to serve throughout the identified rural service areas. (*See, Barron*, p. 4). Because it is able to serve throughout the identified rural service areas, it is logical that Western offers its services to all consumers, including low-income consumers. Furthermore, the RLECs present no evidence disputing that Western offers its service to all consumers. Therefore, the Commission finds that Western offers and is able to provide each of the core services designated for support to low-income consumers in rural, insular or high cost areas and will offer them in accordance with § 214 of the Federal Act and concludes that Western will preserve and advance universal service as an ETC in the identified rural service areas.

24. As noted above, Western maintains that it offers and is able to provide access to emergency services by means of 911. And, although no hospitals or other emergency service providers have requested Western's service (*DeJordy*, p. 5), Western has committed to "work closely

with hospitals to ensure that its universal service offering can be deployed in hospitals” or to provide service through resold RLEC service. (*Reply Comments of Western Wireless regarding Staff Memorandum of December 15, 2000*, p. 5 and *Staff Report*, dated December 15, 2000, p. 5, respectively). The only criticism of Western’s commitment came from Columbus which found “yet more applicant promises very troubling.” Columbus questioned the safety of employing Western’s equipment in hospitals and noted that rural ILECs are not required to resell their services. (*Comments of Independent Telecommunications Group, Columbus et al. Regarding Staff Memorandum of December 15, 2000*, filed February 2, 2001). Western, of course, cannot force hospitals to subscribe to Western’s service and is unable to offer resold RLEC services until it submits a bona fide request to an RLEC which must then be evaluated and approved by the Commission. Weighing the impediments facing Western in the provision of service to health care providers against Western’s provision of access to emergency services and its stated intentions to work with health care providers, the Commission finds that implementation of the Western BUS offering, as described by Western in this Docket, would protect the public safety and welfare in the RLEC service areas. This finding is consistent with the Commission’s findings and conclusions in *Order #6*:

The FCC has stated that wireless companies are not required to provide all of the E911 services until (1) the year 2001 and (2) a local emergency service provider makes arrangements for the delivery of AII and ANI from carriers and establishes a cost recovery mechanism. . . .The KCC finds that WW and Sprint PCS provide access to emergency services as currently defined by the FCC rules. The KCC concludes that WW and Sprint PCS are in compliance with FCC rule 54.101(a)(5).

Order #6, p. 10 (footnotes and citations omitted).

25. In Docket No. 00-GIMT-584-GIT⁵, the Commission determined:

The Commission agrees that it lacks jurisdiction to establish quality of service standards for radio common carriers, but it clearly has jurisdiction to ensure that all ETCs provide universal service in accordance with applicable federal and state law.

584 Order 3: Addressing Jurisdiction, issued May 5, 2000, p. 9. However, the Commission decided that it would not impose quality of service standards, as they relate to the KUSF, on ETCs at that time. Rather, the Commission noted, "If new ETCs do not provide the quality services expected by customers, the Commission will likely learn of this through customer complaints." *Id.*, p. 10. Additionally, in response to the RLECs' claim that Western must comply with quality of service standards, the Commission noted:

Current standards apply only to local exchange carriers. Local exchange carrier is a defined term. K.S.A. 1999 Supp. 66-1,187(h). Local exchange carrier and ETC are not synonymous terms. The assertions that local exchange carrier quality of service standards must apply to all ETCs are not persuasive.

Order #9: On Reconsideration, issued in this docket on April 17, 2000, p. 5.

26. Subsequent to the foregoing Commission findings and conclusions, Western filed its BUS offering and the RLECs filed their *Opposition Statement* in which the RLECs noted:

WW seeks to obtain KUSF support for an offering that is of a lower quality, from a service and feature standpoint, than what is being provided by the incumbent today. In order to qualify for universal service support, a prospective competitive ETC's (CETC) service should be found to preserve and enhance universal service.

Id., p. 9. The RLECs appear to maintain that all the services they offer constitute universal service.

⁵*In the Matter of a General Investigation into Quality of Service Standards to Determine Whether a Uniform Set of Standards Can Be Applied to All Eligible Telecommunications Carriers*, Docket No. 00-GIMT-584-GIT (584).

Such a proposition is incorrect. In order to qualify as an ETC, Western need not provide all the services offered by the RLECs.

27. The RLECs contend that Western's BUS offering does not preserve and enhance universal service because of alleged deficiencies in the provision of (1) equal access, (2) data transmission speeds and (3) enhanced universal services. The Commission has previously disposed of the RLEC's argument with regard to Western's provision of equal access and need not discuss it further here. With respect to the RLECs' insistence that the Kansas Legislature considers 19.2 kbps transmission speed to be in the public interest (K.S.A. 2000 Supp. 66-2011(b)), the Commission notes that provision of high-speed service is not currently a requirement to obtain designation as an ETC under federal or state law. Furthermore, the Rural Task Force of the Federal-State Joint Board recommended that ETC status not be denied simply because an applicant cannot provide high-speed service. (*Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, rel. September 29, 2000, footnote 42, p. 22). Concerning enhanced universal services, this requirement applies to the local exchange companies only. (K.S.A. 2000 Supp. 66-2005(a)). The RLECs have failed to demonstrate that Western's BUS offerings are not quality telecommunications services. As the Commission observed in the *584 Order*, the customer will decide whether a new ETC's service is of the quality expected. The Commission finds that implementation of the Western BUS offering, as described by Western in this docket, will ensure the continued quality of telecommunications services.

28. K.S.A. 2000 Supp. 66-2004 also requires that an ETC applicant will safeguard the rights of customers. Western's BUS filing included a copy of a service agreement that provides (1) service

complaint resolution procedures, (2) adjustment to customer's bill for service outage and (3) customer-initiated termination of service. There have been no allegations by the RLECs that designating Western as an ETC in rural telephone study areas would not safeguard customer rights. Therefore, the Commission finds that implementation of the Western BUS offering, as described by Western in this Docket, would safeguard the rights of customers.

29. In summary of ¶¶ 23 - 28, the Commission finds that Western will (1) preserve and enhance universal service, (2) protect the public safety and welfare, (3) ensure the continued quality of telecommunications services and (4) safeguard the rights of consumers. Therefore, the Commission concludes that Western meets the specifically identified statutory requirements of K.S.A. 2000 Supp. 66-2004(b).

30. The Commission's inquiry does not end here, however, because the Rural Guidelines were supplemented in the Competition Docket, *Order on Reconsideration*, issued February 3, 1997, pp. 15 - 17. The Commission must also consider whether (1) the proposed competitive entry would negatively affect preserving and advancing universal service, at reasonable and affordable rates and with high service quality, in the RLEC's service area; (2) competition arising from the instant application would negatively affect the continued existence of a viable carrier of last resort, capable of providing high quality, affordable required telecommunications services to anyone in the service area on request; (3) the RLEC's service area is capable of sustaining more than one telecommunications service provider; (4) Western will provide, operate and maintain high capacity facilities and services to schools, medical facilities and libraries; (5) Western satisfies the Commission that it will not violate the intent of the law and will provide service throughout the RLEC service area; (6) accommodating multiple telecommunications service providers in the RLEC

service area is technically feasible; and, (7) the economic burden of implementing measures necessary to effect those technical requirements are excessive or unreasonable.

31. The Commission has already found herein that Western's BUS offering would preserve and advance universal service and that Western's services are of sufficiently high quality. With respect to reasonable and affordable rates, Western's BUS offering will be offered to customers at a rate of \$14.99 per month. (*Blundell*, p. 4). The RLECs appear to express some concern with this rate: "This amount is as much as 116% above the rate for residential service presently charged by rural companies." (*Opposition Statement*, p. 18). The RLECs provide no further details as to whether Western's rate is more than what all the RLECs charge or just a single RLEC. Even if Western's rates are 116% greater than what all the affected RLECs charge their customers, the Commission believes that the rural customers will decide whether the rate difference is more than they wish to pay. At this point, the Commission is unable to conclude that Western's rates are either unreasonable or unaffordable.

32. The RLECs argue that designation of Western as an ETC is not in the public interest because competition in RLEC service areas would result in higher prices rather than the lower prices that are assumed to accompany the introduction of competition. The RLECs' argument comes to this:

To the extent that rural service providers are deprived of support for their relatively high costs to provide local service, their customers also will face increased rates for local service as one of a limited range of results. . . .Any reduction of their cost recovery from one source, e.g. by transfer of KUSF support to the applicant, necessitates a compensating increase in recovery opportunity from some source.

(*Opposition Statement*, pp. 18 - 19). The RLECs also insist that if Western is designated as an additional ETC "every economic pressure on existing carriers would work toward reducing service

quality.” *Id.*, p. 22. The RLECs assume that their operations are run at maximum efficiency and at cost. There is no proof in the record of either assumption. The FCC certainly does not subscribe to the RLECs’ claims:

We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

Wyoming Order, ¶¶ 18 - 19. The Commission concurs with this FCC assessment and finds that the RLECs have not offered sufficient evidence that their rates would increase, or that their quality of service must necessarily decrease, because of the entry of Western into their service areas. Consequently, the Commission concludes that, with implementation of the Western BUS offering as described by Western in this Docket, designation of Western as an additional ETC will preserve and enhance universal service at reasonable and affordable rates with high service quality.

33. The second Rural Entry Guideline relates to the withdrawal of Western or an RLEC from a particular study area. In the *Wyoming Order*, the FCC found:

Western Wireless demonstrates a financial commitment and ability to provide service to rural consumers that minimizes the risk that it may be unable to satisfy its statutory ETC obligations after designation. We note that Western Wireless currently provides service in 17 western states. Western Wireless also indicates that it can provide the supported services using its own facilities. By choosing to use its own facilities to provide service in Wyoming, Western Wireless can continue to offer service to any requesting customer even if the incumbent carrier subsequently withdraws from providing service.

Id., p. 9. It should be noted that Western has since added two more states to its operating area.⁶ Western claims that the BUS offerings are transmitted over Western's cellular radio frequencies using its cellular infrastructure of towers, transmitters, receivers and other equipment deployed throughout Western's licensed service areas. (*Western Opposition*, p. 3). There is no evidence in this docket that Western conducts its operations any differently in Kansas than it does in Wyoming. Furthermore, there is no evidence in this docket that Western could not continue to offer service to any requesting customer even if the incumbent carrier subsequently withdraws from providing service. Furthermore, 47 U.S.C. § 214(e)(4) requires notice to the Commission if one ETC expresses its intent to cease serving a particular service area. This assures continuation of service to customers through KCC action. The RLECs did not contend that they could not serve former Western customers if Western exited the RLEC service area. The Commission consequently concludes that designating Western as an additional ETC would not negatively affect the continued existence of a viable carrier of last resort, capable of providing high quality, affordable required telecommunications services to anyone in the service area on request.

34. The third Rural Entry Guideline requires that the service area of an incumbent RLEC be capable of sustaining more than one local exchange service provider. Through the prepared testimony of Chris Barron (*Barron*), attached as Exhibit C to the *Opposition Statement*, the RLECs present (1) customer density information, (2) per capita personal income (PCPI) data, (3) service comparison and (4) RLEC investment levels, to demonstrate that RLEC study areas may not be able to support an additional ETC.

⁶*Declaratory Petition, Opposition of Western Wireless (Western Opposition)*, p. 1, attached to Blundell's Supplemental Testimony as Exhibit 1.

35. The RLECs set out customer lines per square mile and lines served per switch, rural company by rural company; but, then they averaged these statistics and compared that average with the national customer/mile and lines/switch averages to demonstrate the rural nature of the RLECs.

The RLECs then bootstrap this raw data into the following proposition:

The ability of any rural area to support more than one telecommunications service provider depends on the type of provider, the services it offers, and the relationship between the offered services and universal service support sought. If a service already exists in a particular area, such as cellular service, and the provider seeks merely to receive support for providing a different variety of that service, then the public interest would not be met. I state this because there is a finite amount of universal service support available, and to provide it for a service that offers little (or nothing) in the way of public benefit is counterproductive to the goals of universal service.

Barron, p. 9. Staff observed that the population density in Wyoming areas served by rural carriers was 1.25 persons per square mile. (*Staff Testimony of Sandra Reams (Reams)*, p. 6). Compared with the RLEC-developed Kansas customer density of 4.96 persons per square mile, Wyoming could be judged to be four times more rural than Kansas, yet the FCC designated Western as an additional ETC for rural areas in the state of Wyoming. The Commission agrees with Staff that the customer density data provided by the RLECs does not support a conclusion that it would be contrary to the public interest to designate Western as an additional ETC in Kansas rural telephone company service areas. Furthermore, the RLECs' arguments put forward in this regard were economic and regulatory theories and principles which the Commission instructed the RLECs not to re-argue. (*Order #10*, p. 4). The Commission emphasized that, for those rural areas for which Western sought ETC designation, the rural company that served that area had the obligation to demonstrate that such designation was not in the public interest, focusing on the particular factual circumstances existing

in that service area and on the effect on customers in the area. *Id.* The Commission finds that the RLECs failed to do so with regard to customer density and lines served per switch and, consequently, concludes that the RLECs have failed to meet their burden of proof in this regard.

36. Mr. Barron next reported that 13 of the 16 affected RLECs provided county population data for those areas they served and that 12 of the 13 claimed an overall population decrease. Mr. Barron failed to identify which rural companies provided data and which ones didn't and did not identify the sole county of the 13 that did not suffer population decline. Staff countered these statistics with the observation that declining population does not necessarily equate to loss of lines. Indeed, the access line count increased in 1997 and 1999 for all affected rural companies except Mutual Telephone Company, which lost only five access lines. Staff further noted that information obtained in another docket indicated that the trend of access line gain appeared to be continuing. (*Reams*, pp. 6 - 8).

37. Some of the RLECs also reported PCPI from the counties in which the RLECs provided service. The county PCPIs ranged from a low of \$19,933 to a high of \$23,753. The RLECs compared the data with a "Kansas Total" of \$27,203. However, the RLECs do not explain what the "Kansas Total" represents--whether it is state-wide PCPI average, rural county state-wide PCPI average or some other form of average. At any rate, the RLECs roll the alleged declining county population count into the county PCPIs and reach the conclusion:

It is apparent that most of the counties served by the affected rural LECs do not consist of high growth, healthy economic areas. Therefore, it is highly questionable whether these areas will be able to support more than one telecommunications service provider. This is especially true if, in order for the Commission to support an additional provider, universal service support has to be re-allocated and thus diluted.

(*Barron*, p. 12). The Commission is not able to make the leap of logic with the RLECs that the counties which are served by the affected RLECs are too poor to be able to “support more than one telecommunications service provider.” PCPIs are meaningless without comparison to other data such as cost of living in Kansas counties. Further, the RLECs themselves admit that they cannot affirmatively state that the RLEC areas are “not able to support another provider of any type.” (*Barron*, p. 10). And, the RLECs again fail to describe the particular factual circumstances existing in specific RLEC service areas and the effect on the customers in those areas if Western would be designated as an additional ETC. Therefore, the Commission concludes that the RLECs have failed to meet their burden of proof that designating Western as an additional ETC is not in the public interest, based upon declining county population counts and county PCPIs.

38. The RLECs then compare the services they provide with Western’s services. The RLECs admit that the RLEC and Western universal service offerings are similar from the perspective of 47 C.F.R. 54.101. (*Barron*, p. 13). Without identification of the particular rural companies, the RLECs describe the additional services that some of the RLECs provide that Western does not. The conclusion that the RLECs arrive at is that “WW’s BUS does not offer the same level of service that the rural LECs offer.” As such, the RLECs doubt that it would be in the public interest to subsidize a “clearly substandard service offering with KUSF support.” (*Barron*, pp. 13 - 14). State and federal law do not support the RLECs’ proposition. For instance, there is no dispute that 47 C.F.R. 54.101 lists the services that will be supported by federal universal service funding. “CLASS features, such as CALLER ID and Selective Call Forwarding” (*Barron*, p. 14) are not listed as supported services. Thus, the RLECs’ claim that Western should be denied ETC designation because it does not provide these services, as do some of the RLECs, is unsupportable. Furthermore,

the RLECs have failed to provide particular factual circumstances existing in specific service areas and the effect on customers in those service areas that would result if Western were designated as an additional ETC. Consequently, the Commission concludes that the RLECs have failed to meet their burden of proof that designating Western as an additional ETC in RLEC service areas is not in the public interest, based upon service comparison provided by the RLECs and Western.

39. The RLECs next provide current and future investment dollars of most of the affected RLECs for the purpose of demonstrating the commitment they have made to universal service in Kansas and the investment that they are prepared to make in the future, apparently for advanced service deployment. The RLECs warn that future investment is at peril if Western is allocated part of the KUSF support that would be used as part of that future investment. (*Barron*, pp. 15 - 17). Staff noted that viewing gross investment from only a Kansas perspective is misleading because gross investment is actually allocated between interstate and intrastate for cost-recovery purposes. Staff believes that it is a reasonable assumption that, given that none of the affected RLECs have filed for increased rate recovery in recent years, the depreciated asset investment has been adequately recovered. (*Reams*, p. 11). Further, “future investment” may or may not be committed by the RLECs. The Commission is of the opinion that it may not refuse to designate Western as an additional ETC based upon conjecture of what might happen to “future investment”. In addition, the RLECS have, again, failed to provide details of particular circumstances existing in specific study areas and the manner in which customers in those areas would be affected by the designation of Western as an additional ETC in those specific service areas with respect to “future investments”. Consequently, the Commission concludes that the RLECs have failed to meet their burden of proof

to demonstrate that Western's designation as an additional ETC in RLEC service areas would not be in the public interest in this regard.

40. The fourth Rural Entry Guideline requires the new ETC to provide, operate and maintain high capacity facilities and services to schools, medical facilities and libraries. The RLECs believe that the Commission should carefully consider this "criterion, perhaps above all other others, because it ensures that rural Kansas will enjoy the benefits of technological advancement and the information age." (*Opposition Statement*, p. 29). The RLECs quote an RLEC RFI and the Western response to provide "ample evidence that WW is not able to meet this requirement":

QUESTION. SIA-012

RE: UNIVERSAL SERVICE

To what extent are high-speed data transmissions currently offered by WW to customers in Kansas? Where are they offered? Are they offered to residential or business customers or both? Please provide supporting data.

RESPONSE.

"...Today, Western Wireless does not consider itself to be providing high-speed data transmissions in Kansas."

Id. (emphasis in original). The RLECs fail to provide the Commission with the entire Western response which also states, "The testimony of Mr. Blundell is that the Company would provide data speeds in excess of speeds currently offered by landline companies by the end of next year." The Commission has already held that "designation comes first, the obligation to offer and advertise the supported services follows." (*Order #7*, p. 8). As with the other Rural Entry Guidelines, the RLECs did not comply with the Commission's *Order #10* because they failed to provide details of particular circumstances existing in specific study areas and the manner in which customers in those areas would be affected by the designation of Western as an additional ETC in those specific study areas.

Consequently, the Commission concludes that the RLECs have failed to meet their burden of proof to demonstrate that Western's designation would not be in the public interest with respect to Western's transmission speeds.

41. The fifth Rural Entry Guideline requires the applicant to satisfy the Commission that it will not violate the intent of the law and that it would provide service throughout the service area of the RLEC. The Commission finds that Western's application as a whole clearly demonstrates that Western will abide with the intent of the law relative to its designation as an additional ETC in the affected RLEC service areas. With respect to area-wide service, Western has identified those specific RLEC service areas in which it provides service throughout the entire study area. The RLECs did not dispute that Western will provide service throughout those identified study areas and, as a whole, have failed to demonstrate that Western will violate the intent of the law. Consequently, the Commission concludes that the RLECs have failed to meet their burden of proof to demonstrate that Western's designation would not be in the public interest, based upon this Rural Entry Guideline.

42. The sixth Rural Entry Guideline requires that it must be technically feasible to accommodate multiple telecommunications service providers in the RLEC service areas. The RLECs offered no argument with respect to the technical feasibility of Western providing service under its designation as an additional ETC. In contrast, Western described a number of times the manner in which the service would be provided. (*See, e.g., Blundell*, p. 3). Consequently, the Commission concludes that the RLECs have failed to meet their burden of proof that designating Western as an additional ETC in RLEC study areas is not in the public interest as it relates to this Rural Entry Guideline.

43. The final Rural Entry Guideline requires that the economic burden of implementing measures necessary to achieve the technical feasibility above must not be excessive or unreasonable. The RLECs never claimed that such implementing measures would cause excessive or unreasonable economic burdens. Consequently, the Commission concludes that RLECs have failed to meet their burden of proof that designating Western as an additional ETC in RLEC study areas is not in the public interest as it relates to this particular Rural Entry Guideline.

44. In summary of ¶¶ 30 through 42, the Commission concludes that the designation of Western as an additional ETC in the affected RLEC study areas will not offend any of the Rural Entry Guidelines.

45. The Commission reviewed the Comments of the Docking Institute of Public Affairs Fort Hays State University (Docking) (*Opposition Statement*, Exhibit D) and the Correspondence from the Rural Utilities Service (RUS) (*Id.*, Exhibit E). Although the Commission appreciates the efforts of Docking and RUS in the informative production of their respective positions, the Commission finds them to be arguments based on economic or regulatory theories and principles that the Commission has already considered. The Commission was clear in its instructions to the RLECs- focus on particular factual circumstances existing in a service area and the effect of designating an additional ETC on the customers in that area and do not re-argue economic or regulatory theories and principles.

46. Finally, the Commission is compelled here to address a continuing misunderstanding of the RLECs. In their *Opposition Statement*, the RLECs declare, “[T]he KCC has recently rejected contentions that expanded local calling is in the public interest.” (*Id.*, 16). Quite the opposite is true. The Commission specifically found:

It is in the public interest for customers to have increased local calling scopes or lower cost toll service available to them. It is contrary to the public interest to provide for larger calling scopes or discounted toll plans through the KUSF because all customers are then required to pay for this benefit for a very small number of customers without a demonstration that these customers are somehow more deserving of this benefit than all other Kansans who might also want an increased calling scope or discounted toll plan.

In the Matter of a General Investigation into Statewide Availability of Optional Community Calling Service and Related Access Issues, Docket No. 96-GIMT-230-GIT, Order on Reconsideration, issued August 2, 2000, ¶ 8(a). Western has not requested recovery of expanded calling scope costs; rather, it seeks ETC designation to receive the portable KUSF amount for customers that change from RLEC service to Western service.

47. The Commission concludes that Western should be designated as an additional ETC in the service areas of the fifteen rural telephone companies identified *supra*, for both federal and Kansas universal service support purposes.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. Western is designated an additional ETC for federal and state universal service support purposes in the service areas of the fifteen rural telephone companies identified herein.

B. Any party may file a petition for reconsideration of this Order within fifteen (15) days of the date this Order is served. If service is by mail, service is complete upon mailing and three (3) days may be added to the above time frame.

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary and proper.

BY THE COMMISSION IT IS SO ORDERED.

Wine, Chr.; Claus, Com.; Moline, Com.

Dated: OCT 12 2001

ORDER MAILED

OCT 15 2001

 Executive
Director

Jeffrey S. Wagaman
Executive Director